Report from the Annual Pacific Northwest Institute on

Special Education and the Law

IDAHO STATE DEPARTMENT OF EDUCATION
OFFICE OF DISPUTE RESOLUTION

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Overview of 2010 Conference

The Office of Dispute Resolution at the Idaho State Department of Education was well-represented at this year's conference. In addition to the Dispute Resolution Coordinator, we were able to send seven of our contracted mediators, complaint investigators and hearing officers.

The general sessions centered around new trends in special education litigation, with Art Cernosia presenting on "Evaluation and Eligibility."

A highlight from the conference was a presentation by Amy Rowley — yes *that* Rowley, of the 1982 landmark Supreme Court case Board of Education v. Rowley. This is the case which established, in part, that individualized decisions based on the unique needs of each child were essential under law to provide FAPE. An interesting result of this case was that the young Miss Rowley was denied an interpreter and ended up leaving the district because of lack of services. Her personal story offers a stark contrast from the celebrated effects of her case.

As often happens at such conferences, there was so much information presented that absorbing it all at the time was impossible. In an effort to share the highlights, each of our contractors was asked to provide key cases or important information he felt critical for districts and those involved with special education to know. This newsletter is the result of that request.

Thank you to our contractors who gave of their time and energy to share experiences from the conference. Thanks to: John Cronin, Paul Epperson, Steve Hansen, Mont Hibbard, Ed Litteneker and Mike Moore.

Difference between Accommodations and Modifications

The presenters, Elaine Eberharter-Maki and Diane Wiscarson, clarified the difference between accommodation and modification, which often get confused. An accommodation is a change in the means of how the students will demonstrate their performance (such as additional time to take a test or use of verbal instead of a written format). A modification is a change that enables a student to advance appropriately toward goals and obtain access to academic and non-academic activities (such as modifying curriculum).

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Notifying School Staff of IEP

It was surprising to learn how often school districts find themselves out of compliance based simply on a failure to inform all staff that a particular child is on an IEP and what responsibilities individual staff members have with respect to that student. To resolve this, many districts are routinely sending emails to staff in order to document that everyone on the team has been informed of individual responsibilities.

Limitations of Complaint Processes

Suzy Harris presented an overview of the IDEA dispute resolution processes: mediation, complaints and due process hearings. She characterized the complaint process as a "poor person's due process hearing."

She addressed the thoroughness of the due process hearing as compared to the complaint process and noted that hearings have more bells and whistles and can be very expensive for all parties. It was her position that a complaint investigation is not really appropriate for fact-finding. She contends that a major drawback of the complaint investigation is that when the facts are highly contested, the complaint interview does not allow for examination and cross-examination.

Teacher's Liability Issues

In the session on "Scrutinizing IEPs," one point that really stood out was the fact that teachers who refused to perform an accommodation may be held liable.

In one case, Doe v. Withers, a court held a teacher liable for $5000 in compensatory damage, and $10,000 in punitive damages because he refused to provide oral testing as provided as an accommodation in the child's IEP.

This contractor personally observed cases in which teachers have balked at providing certain accommodations in cases where they did not agree with the IEP team's recommendations. It was eye opening to learn the potential ramifications. in those instances.

" I WAS STRUCK BY HOW FAR WE HAVE REALLY COME, BOTH FROM AN EDUCATIONAL STANDPOINT AND AS A SOCIETY, IN ADDRESSING THE NEEDS OF INDIVIDUALS WITH DISABILITIES."

- SDE Contractor

Amy's Story: 30 Years after the Rowley Decision

Several of our contractors were personally affected by Amy's recitation of her story and her parent's efforts to provide her and others with disabilities access to education in our public schools.

One noted that "After hearing about and reading about the Rowley case over the years, and realizing the significance of the case, it was a real treat to listen to Amy tell her story. While listening to her I was struck with a sense of true empathy for what she and her family endured. I was also struck with the realization of how far we have really come, both from an educational standpoint and as a society, in addressing the needs of individuals with disabilities."

Another shared that Amy's "hindsight view of being a second grader when her parents filed suit against the school district and what services she now believed would have been appropriate was interesting." He added it was also striking to learn of the substantial effect her mother had on her and that the district's argument that she was doing grade-level work was directly attributable to every evening spent at the kitchen table with her mother re-teaching the material presented at school that day.

This story reflects the love and support parents have for their children and the sacrifices they are willing to make to get the help their children need and deserve. One noted, "Visualizing the many hardships Amy and family dealt with through the years and seeing this high energy, positive adult, parent, and teacher is simply amazing."

More than one spoke to her passionate delivery and inspiring advocacy. One said, "If you have the opportunity to hear Amy tell her story, do not pass it up. You will come away feeling great about what you do for students, while at the same time having a true and meaningful appreciation of IDEA. Let's always do what's best for kids."

The Rowley Test: The benefits of reviewing the Rowley twofold inquiry on an annual basis may save the district and staff from any parental allegation that could arise by not following correct procedures of IDEA when developing and implementing a student's IEP, or counter allegations the program developed does not meet the educational needs of the student. The Rowley twofold inquiry asks: 1) has the state complied with the procedures in the act, and 2) Is the IEP reasonably calculated to enable the child to receive educational benefits? Additional points of inquiry have been added since the Rowley decision. *Cypress-Fairbanks ISD v. Michael F., 5th Circuit, 1997* further challenges districts to ask: 1) Was the program individualized on the basis of the student's assessment? 2) Was the program in the LRE? 3) Were the services provided in a collaborative manner by key stakeholders? and 4) Were positive academic and nonacademic benefits demonstrated?

Keys to Successful IEPs

Several participants highlighted information they gleaned at the conference that leads to success in the IEP process.

Developing a positive relationship with parents is critical in successful IEP development. Strategies for keeping the meetings student-focused and communicating the value of parental input were identified. Simply using a child's name (instead of "the student") can help parents realize a team's commitment to their child.

Having empathy for a parent's perspective, including recognizing possible sources of intimidation, such as overreliance on lingo or titles instead of first names, was noted.

There were many cautionary tales of districts who showed up for an IEP with a plan already decided and were found by courts to have engaged in unilateral placement or predetermination.

Suggestions for districts include making sure that any draft IEPs have the word "DRAFT" clearly visible. Also, making (and keeping) notes on the draft that include parent's ideas and considerations is advisable.

Additionally, remember to meet those IEP deadlines. Realize that the annual due date is a date of <u>completion</u>, not of starting an IEP process.

As new and more staff have contact with students on IEPs, being proactive by educating the staff on the importance of writing IEPs procedurally correct and with substance, will go a long way toward developing a positive working relationship with parents. And it's the right thing for the student.

Come to an IEP meeting with an open mind, not an empty mind. It's okay to have planned for the meeting, just don't predetermine the outcome.

Questions about Using Grades as Measurable Goals

The importance of measurable annual goals was highlighted, specifically concerning "realistic" goals based on a measurable data regarding a student's present level of performance.

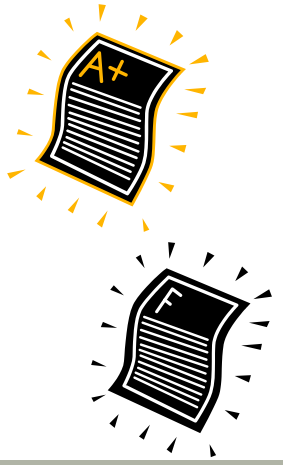
A question was raised of whether grades should be used to ascertain measurable goals.

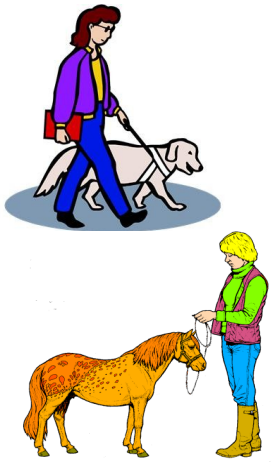
A student's present level, or starting point, should be based on data gathered from a specific instrument that measures the growth of the skill, such as fluency, in which the goal is based.

So the question remains, "Should grades be used to ascertain measurable goals?" The answer is, "No."

Since measurable goals are a direct assessment of individual skills, a comprehensive grade in reading, for example, which includes multiple assignments, does not discern whether the skill, in this case, fluency, has been attained.

Therefore, grades are inappropriate measurements for IEP goals.





Regulations Regarding Service Animals

There is no federal law governing use of service animals in schools; however, not allowing one could be discriminatory under Section 504 of the American with Disabilities Act.

Recently, the Justice Department outlined rules for service animals in Title II facilities. A service animal is defined as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical sensory, psychiatric, intellectual, or other mental disability. The animal must (1) be under the handler's control and (2) be housebroken.

In addition to outlining questions about the care of the animal and general access, the Justice Department noted that all of the requirements also apply to miniature horses.

What effect do self–esteem, poor choices, and other factors have on the Manifestation Determination?

"Other factors in a student's life may or may not influence him/her to act in certain ways. For example, a student may have a poor home life or be a victim of a bully. These factors may have a profound influence on the student's behavior, but the new manifestation determination procedures do not contemplate the consideration of these factors UNLESS they form the basis for IDEA eligibility."

-Melinda Jacobs, Esq.

Understanding New Rules for Manifestation Determination

Melinda Jacobs presented on how to use the "new rules" to your advantage in a Manifestation Determination. One of our contractors noted that the topic was exceptionally timely because he had an IEP meeting coming up where there was a dispute about the circumstances of a student having been out of school.

In his situation, the parents believed the student had been suspended for more than ten days. He notes that in his case, the District could have contended that the student had not been suspended for more than ten days and that the parent had voluntarily removed the student from school.

What was significant for this facilitator was that the presenter identified significant changes in the manifestation determination process required by the IEP Team.

Prior to the new rules, IEP Teams were required to do much more analysis, which included a determination as to the appropriateness of the IEP. In 2008 the District Court of D.C. in District of Columbia v. Doe set aside a Hearing Officer's decision which had shortened a suspension of 45 days to 11 days.

The Court made the determination that once the Hearing Officer determined that a manifestation determination was appropriate, it was up to the District's discretion on how to discipline that student. Furthermore, the district could discipline a student the same as any other student who was not diagnosed with a disability, as long as the student was not denied FAPE.

What's New from the Courts

PARENTAL CONSENT
A state court held that the school district could not proceed with an initial special education evaluation when one parent provided written consent for the evaluation and the other parent provided a written refusal to consent to the evaluation. The parents are free to litigate any dispute regarding their relative educational decision-making rights in the family court.

In the Matter of J.J. v. Northfield Public School District, 52 IDELR 165 (Minn. Ct. Appeals 2009)

END TO ELIGIBILITY
A student with a Health Impairment is no longer eligible when demonstrating "age expected success" in the general education curriculum with modifications and accommodations provided by the general education staff. This case also involved a physician's prescription that the student receive "special education." A physician is not a trained educational professional with knowledge of the subtle distinctions that affect IDEA classifications.

Marshall Joint School District No. 2 v. C.D. (7th Circuit, 2010)

CHILD FIND
A school referred a student to a mental health counselor. The counselor recommended a special education evaluation. The school district violated its child find responsibility when it did not refer the student for a special education evaluation, and instead promoted the student to the next grade level. The school did finally evaluate the student when the parent made a referral.

Compton Unified School District v. Addison (9th Circuit, 2010)

Inclusion and Mainstreaming

The IDEA doesn't use the terms "inclusion" or "mainstreaming" and thus these terms lack concrete definitions. However, the concept of inclusion is referred to often as a means to provide a child educational services in the least restrictive environment possible. Caution warrants not confusing the two terms, as mainstreaming generally refers to placement in the regular classroom with an expectation that the child will meet the regular curriculum with supplementary aids and services. Inclusion speaks to placement in the regular classroom environment, but the individual academic and nonacademic needs of the student will be accommodated.

RTI is not a Prerequisite for Receiving Special Ed Services

Art Cernosia, Esq., presented on Evaluation and Eligibility which highlighted relevant case law in the area. Of particular note was the *El Paso Indep. Sch. Distr. v. Richard R., 2008* decision. The court found that the district failed in its child find efforts under IDEA. The student had multiple indicators of failure on state assessments, poor marks in multiple subjects, and continued difficulty even with 504 accommodations. The court found that the school should have suspected the student had a disability. The court also found that that when the parent requested a special education evaluation, and the school claimed that local policy was not to do an evaluation at that time and instead consider other interventions prior to the evaluation, the IDEA overrode district procedures.

Independent Educational Evaluation (IEE) Issues

Parents have a right to obtain one IEE at the district's expense if a parent disagrees with an evaluation obtained by the district. If a parent requests an IEE, the district must provide information about where parents can obtain one and provide the criteria necessary for the independent evaluation. Parents are only entitled to one IEE at the school district's expense, unless the district initiates a due process hearing to show that their evaluation is appropriate or that the evaluation obtained by a parent doesn't meet the agency's criteria. Districts can request, but not require, parents to provide a rationale for the IEE request.

If an IEE presents a differing opinion than the district's evaluation, the onus of responsibility is on the district to explain competing diagnoses. The 9th Circuit Court held that the district failed to consider the IEE as required by the IDEA since the IEP team didn't include a staff member who had knowledge in the suspected disability, and also failed to explain the inconsistencies between the district's evaluation of the student and what the parents presented with the IEE.

See Seattle School District v. B.S. 9th Circuit Court

IMPERMISSIBLE FACTORS FOR DETERMINING PLACEMENTS MAY INCLUDE CATEGORY OF DISABILITY, CONFIGURATION OF THE DELIVERY SYSTEM, AVAILABILITY OF EDUCATIONAL OR RELATED SERVICES, AVAILABILITY OF SPACE, AND ADMINISTRATIVE CONVENIENCE.

More New Court Cases

MULTI-DIMENSIONAL EVALUATION REQUIRED

Parents challenged a school district's findings that a child was no longer eligible for special education services based on a student's achievement score showing no severe discrepancy as compared to peers. The Court held that the IDEA prohibits reliance on any one test for determining eligibility.

M.B. v. South Orange-Maplewood Board of Education, US District Court New Jersey (2010).

DISTRICT'S RIGHT TO ASSIGN

The 9th Circuit Court found that the IDEA does not require a school district to assign staff members that parents desire. The Court held that FAPE was provided even though the aide previously working at home with the student was not assigned to be his aide in the classroom.

See Gellerman v. Calaveras Unified School District, 37 IDELR 125 (US Court of Appeals, 9th Circuit 2002), and Blanchard v. Morton School District, 54 IDELR 277 (US Court of Appeals 9th Circuit 2010).

PREDETERMINATION

The Court found a district predetermined a student's placement in a decision to transfer him from a private placement back to the public school. The decision, made prior to the IEP meeting, did not demonstrate necessary "open-mindedness." The administrator opened the IEP meeting with, "We'll talk about a transition plan" to bring the child back to the public school. The Team never discussed keeping the student at the private placement, although the district knew the parents' preference.

H.B. v. Las Virgenes Unified School District 110 LRP 15671 US. Court of Appeals, 9th Circuit, 2010).